ARBITRATION AWARD

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| CITY OF MILWAUKEE, WATER DEPARTMENT<br>and<br>DISTRICT COUNCIL 48, AFSCME, AFL-CIO, and its affiliate LOCAL 550 | Re: Grievance #19-80 |

Appearances: For the City of Milwaukee: James B. Brennan, City Attorney, by Nicholas M. Sigel, Esq., Principal Assistant City Attorney, 800 City Hall, 200 East Wells Street, Milwaukee, Wisconsin 53202.

For the Union, District Council 48, Local 550, American Federation of State, County and Municipal Employees, AFL-CIO: Podell, Ugent & Cross, S.C., by Nola J. Hitchcock Cross, Esq., 207 East Michigan Street, Milwaukee, Wisconsin 53202.

The Water Department is one of several City departments which has employees included in the unit represented by the Union. Pursuant to the provisions of the agreement the undersigned was chosen as arbitrator in this dispute by the parties from a list of arbitrators submitted to them by the Wisconsin Employment Relations Commission. The dispute was carried through the steps of the grievance procedure in the labor agreement and is properly before the arbitrator. A hearing was held in Milwaukee on October 29, 1980. It continued and was concluded on December 12. Briefs were to be exchanged through the arbitrator three weeks after the transcripts were received, but there were two delays and the final

day for receipt of the briefs was ultimately set as May 5, 1981. The Employer brief was timely filed. The Union did not file a brief.

This proceeding involves a Union protest of assignment of certain broken water main repairs to a private contractor. The work performed by the contractor involved mending two broken mains on Monday, January 14, 1980. The grievance was filed as a sort of class action on January 25, 1980. At the hearing the parties disagreed on how to express the issue, the Union desiring to phrase it in terms of a general assertion of violation of the labor agreement provisions and the City desiring to limit the question of violation to the terms of a specific paragraph in the agreement. Since the Union's proposed wording encompasses everything included in the proposed wording of the City, the Union's wording is adopted.

## THE ISSUE

Did the City violate the collective bargaining agreement when it contracted out the repair of broken water mains on January 14, 1980?

If so, what is the remedy?

## PERTINENT PROVISIONS OF THE LABOR AGREEMENT

C. MANAGEMENT RIGHTS

> 1. Union recognizes the prerogative of City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers or authority which City has not officially abridged, delegated, or modified by this Agreement are retained by City. The Union recognizes the exclusive right of the City to establish reasonable work rules. The City will notify District Council 48 in advance of changes in written work rules except in emergencies. Any dispute with respect to these work rules shall not

in any way be subject to advisory or final and binding arbitration but any dispute with respect to reasonableness may be submitted to fact finding pursuant to Section 111.70 of the Wisconsin Statutes.

2. City has the right to schedule overtime work as required in a manner most advantageous to the City and consistent with the requirements of municipal employment and the public interest.

3. It is understood by the parties that every incidental duty connected with operations enumerated in job descriptions is not always specifically described. Nevertheless, it is intended that all such duties shall be performed by the employe.

4. The City reserves the right to discipline or discharge for cause. The City reserves the right to layoff for lack of work or funds, or the occurence of conditions beyond the control of theCity or where such continuation of work would be wasteful and unproductive. City shall have the right to determine reasonable schedules of work and to establish the methods and processes by which such work is performed.

5. Contracting and subcontracting. The Union recognizes that the City has statutory and charter rights and obligations in contracting for matters relating to municipal operations. The right of contracting or subcontracting is vested in the City. The right to contract or subcontract shall not be used for the purpose or intention of undermining the Union nor to discriminate against any of its members. The City agrees to a timely notification and discussion in advance of the implementation of any proposed contracting or subcontracting. The City further agrees that it will not lay off any employes, who have completed their probationary periods and have regular civil service status at the time of the execution of this Agreement because of the exercise of its contracting or subcontracting rights except in the event of an emergency strike or work stoppage, or essential public need where it is uneconomical for City employes to perform said work, provided, however, that the economies will not be based upon the wage rates of the employes of the contractor or subcontractor, and provided it shall not be considered a layoff if the employe is transferred or given other duties at the same pay.

The fact that employes are in, or may become in, a laid-off status shall not prevent the City from exercising its right to contract or subcontract work as long as the contracting or subcontracting does not

cause the layoff or layoffs or cause the elimination of the job or jobs which the employe or employes performed.

6. The City will give the Union reasonable and timely notice prior to its final decision in cases wherein City departments are merged or separated and will afford the Union an opportunity to present its position with respect thereto.

## POSITION OF THE PARTIES

Although the hearing lasted two full days, the position of the Union can be stated succinctly and simply:

1. The fourth sentence of Paragraph C. 5., Contracting and subcontracting, quoted above, states that "the City agrees to a timely notification and discussion in advance of the implementation of any proposed contracting or subcontracting." A Union witness testified that he was notified by telephone at 8:20 a.m. on Monday, January 14, 1980 about the contract for water main repairs. The message was short: The City had decided to contract for water main repair for the reason that there were eleven breaks. The contractors had already been identified and had agreed to do the work. The Union argues that this was not timely notification nor was it discussion in advance of implementation of contracting. Thus the action of contracting for the repair work was a violation of the labor agreement.

2. The prospect of an increasing number of broken mains was known by the City on Friday, January 11. It could have scheduled additional employees over the weekend to make the repairs. Instead, the City waited until early Saturday and Sunday mornings, January 13 and 14, to telephone qualified employees to come in

to do the work. Both by failure to plan for the emergency prior to the weekend and by its inadequate attempts to contact employees on Sunday, when the emergency was even more apparent, the City has violated its obligation under Paragraph C.,2., "to schedule overtime work as required in a manner most advantageous to the City and consistent with the requirements of municipal employment and the public interest."

3. Given the circumstances described briefly in the previous paragraph, the City had the option and the ability and the opportunity to use bargaining unit employees to perform the work that was contracted for on January 14. Some of the employees performing hydrant repair work on that day could have been shifted to water main repair. Since the City did not properly schedule the employees it had available, it violated its obligation under Paragraph C., 4. "to determine reasonable schedules of work and to establish the methods and processes by which such work is performed." Under all the circumstances the City adopted an unreasonable schedule of work by not scheduling bargaining unit employees to do the work performed by the contractor employees. Implicit in the Union's arguments in point 2 above and in this point 3 is an assumption by the Union that the City has an obligation to use City employees working overtime rather than contractor employees. The Union introduced testimony purporting to indicate that the cost of repairing two broken mains by contractor forces had cost several hundred dollars more than it would have cost had the City assigned the work to bargaining unit employees at overtime rates.

The City's arguments can also be stated briefly.

1. The "timely notification and discussion in advance" relating to contracting for the water main repair, as required by the labor agreement, had taken place on January 3 at a meeting with the Union that climaxed a discussion between the parties that had been going on for several months. The Union had proposed in September, 1979 that the City agree to four man crews for night-time water main repair work. The City had taken the position that although sometimes four man crews were appropriate, it did not want to be restricted in periods of emergency by a requirement that a fourth man be found when a three man crew was otherwise available to perform necessary repair work. The City had countered with a proposal that volunteers be solicited from among regular employees to accept temporary promotions so that they could act as crew repair leaders, thus allowing the City to recall laborers on winter layoff from other City departments to supplement regular employees during the winter season of peak water main breaks. The Union had not agreed to this proposal and had in fact encouraged employees who originally volunteered for such temporary promotions to remove their names from sign-up lists that had been posted. According to the City these discussions, which had been carried on in four previous meetings (one in September, two in November, one in December), reached a climax during a meeting with the Union on January 3. Since the parties were unable to agree, the City asserts that it announced its intention to contract for water main repairs when an emergency situation occurred. The Union representatives present at the meeting were said to have acknowledged the notification and had responded that if the contracting occurred, they would take the matter to

arbitration. It is the City's position that this incident constituted timely notification. The requirement of "discussion in advance" had been met by the meetings held during the autumn of 1979 that had culminated in the disagreement and the resultant "timely notification" by the City during the meeting on January 3, 1980.

2. The City has the "right to schedule overtime work" under Paragraph C., 2. This does not mean that it has an obligation to do so nor that employees in the unit have any guarantee that overtime will be extended to them.

3. Likewise the City has "the right to determine reasonable schedules of work" pursuant to the wording in Paragraph C., 4. In the City's view it has done so. A reasonable effort was made to obtain enough regular employees to perform the repair work on Sunday, January 13. There were not enough employees who responded to the telephone calls that were made. In the face of this emergency the City had the right and the obligation, in the public interest and because it was advantageous to the City from a safety standpoint, to opt to have a limited amount of water main repair work performed by private contractors. (As it turned out, only one contractor was used to repair two broken mains. The work was completed on Monday, January 14.)

The City argues that its actions did not cause any layoffs nor the elimination of any jobs. Contracting was not used for the purpose of undermining the Union nor to discriminate against any of its members. In sum, the Union has no standing to sustain this grievance.

## OPINION

The Union bases its case partly on what this arbitrator considers to be an unusual interpretation of management's obligations pursuant to Paragraphs 2 and 4 of the Management Rights clause. A management rights clause is intended for the purpose of spelling out the rights that management retains despite the other restrictions on management autonomy in the agreement. For instance, the right of the City in Paragraph C., 2. "to schedule overtime work as required in a manner most advantageous to the City. . ." would ordinarily be interpreted to mean that this right exists despite inconvenience it may cause for employees who engage in the scheduled overtime work. It is not a restriction on the rights of the City nor a guarantee for employees, but rather just the oppcsite. The same can be said for the wording in Paragraph C., 4. where the City retains "the right to determine reasonable schedules of work and to establish the methods and processes by which work is performed." Failure of the City to obtain the Union's agreement on these matters would not by itself make those schedules of work "unreasonable." Paragraphs 2 and 4 of this Management Rights clause do not spell out guarantees for employees. On the contrary, they describe the rights that the Employer retains.

Paragraph 5 of the clause, however, does contain wording that modifies management rights in that the City thereby agrees to "a timely notification and discussion in advance of the implementation of any proposed contracting or subcontracting." The Union asserts that when the City contracted on the evening of January 13

or the morning of January 14 for the repair of certain broken mains, it violated the labor agreement since it did not so inform the Union until 8:20 a.m. on January 14. But here the issue is a factual one, that is, whether the dialogue between the City and the Union in several meetings held during the autumn and early winter of 1979 constituted "discussion in advance" and whether the announcement by the City at the meeting of January 3, 1980 of its intention to contract for repair of certain broken water mains sometime in the future constituted "timely notification." On this issue there was a conflict in the testimony in the sense that two City witnesses remembered quite clearly that City officials had told the Union representatives in the January 3 meeting that their pronouncement was made in conformance with the requirement of the labor agreement and that the Union representatives had acknowledged that fact. One Union witness said that he did not remember the incident, although he did testify later, in rebuttal, that he considered the pronouncement to be a threat (rather than a "timely notification") by the City that it might later contract for water main break repair. Another Union witness had the following exchange with the City's counsel:

> Q. Now do you recall at that meeting that the City advised through the person of Mr. Trindl, Mr. Trindl was inquiring if after it advised the Union that since it did not have sufficient work force it felt it had arrived at that point in time that it would go to outside contractors and Mr. Trindl was inquiring whether your knowledge of this would be considered as the required notice in advance of contracting out? Do you recall him saying that?
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> A. I recall him saying that.
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> Q. Do you recall that the Union replied, somebody on behalf of the Union that was there that day replied that there would be no dispute on that?

A. I don't know. It could have been me, it could have been any one of us might have said that.

On the basis of (1) this exchange, as well as other testimony from witnesses of both sides recollecting and not recollecting the event, (2) the general demeanor of all the witnesses, (3) the fullsome descriptions from both sides of the discussions that had taken place in several previous meetings between the parties concerning how the generally predictable incidents of broken water mains were going to be handled during the winter of 1979-80, (4) the factual situation during the weekend of January 12 and 13, 1980, including the record of efforts by the City to assemble additional crews for overtime work on Sunday, January 13, and (5) the description of the emergency situation that existed late Sunday, January 13, including the anticipated additional problems of irate citizens, traffic hazards from icy streets in the vicinities of the breaks, and the attendant liability risks for the City, I am constrained to believe that the notice and discussion requirements in the fourth sentence of Paragraph C., 5. had been met by the City in the discussions during the autumn of 1979 and culminating in the final disagreement at the meeting held on January 3, 1980, and the City's pronouncement about its intention to contract.

Although I have said above that I do not believe that one can interpret the obverse of a management right to be an employee guarantee or an obligation on the part of the Employer, the factual situation regarding broken water mains on Friday, Saturday, and Sunday, January 11 to 13, deserves further comment in light of the

Union's view that the City acted improperly in not either scheduling the overtime in advance or being more persistent in telephoning employees for overtime work on Sunday, January 13. Testimony at the hearing indicated that experience in the winter of 1977 had resulted in a rule of thumb that the existence of ten water main breaks in the City of Milwaukee constituted an emergency situation that had called for the use of outside contractors. On Friday, January 11, 1980 there were four breaks at 8:00 a.m. That day the temperature was 51 degrees, but the weather prediction was for a sharp drop in temperature to about zero over the weekend. On the basis of past experience Water Department supervision knew that they needed to be alert for more trouble with breaks during succeeding days. On Saturday morning at 8:00 a.m. there were eight breaks. So in addition to the one crew scheduled to work that day, five extra crews were called in for overtime work. The situation was more serious on Sunday when there were ten breaks at 8:00 a.m. On that day four extra crews were called in for overtime work. By Sunday afternoon conditions had not improved and sometime in the evening the figure of ten breaks had been exceeded and the Superintendent of the Water Department, after consulting with the Deputy Director of Public Works, decided to seek assistance of private contractors for water main break repairs on Monday, January 14.

The usual procedure during the week when such events occur is for the normal complement of crews to continue working after the end of their shift. The situation is different on weekends when ordinarily only one crew is on duty. Had the increasing number of water main breaks encountered on the weekend of

January 12 and 13 occurred during the normal work week, the situation probably would have been handled by the use of unscheduled overtime by the regular crews. Since it happened on the weekend when it was necessary for the City to try to assemble crews on an ad hoc, emergency basis, I do not find it unreasonable that the City determined on Sunday evening that the situation constituted an emergency that called for the use of outside help. Since I have ruled that the notice and discussion requirements had been met before January 14, I believe that the City acted prudently and within its authority under the Management Rights clause when it engaged outside contractor help to repair water main breaks on that date.

AWARD

The grievance is denied. The City did not violate the collective bargaining agreement when it contracted out the repair of broken water mains on January 14, 1980.

Dated: June 16, 1981
at Madison, Wisconsin

Signed: David B. Johnson
David B. Johnson
Neutral Arbitrator